

# STAMP AND RETURN

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of )  
)  
PENDLETON C. WAUGH, CHARLES M. ) EB Docket No. 07-147  
AUSTIN, and JAY R. BISHOP )  
)  
PREFERRED COMMUNICATIONS ) File No. EB-06-IH-2112  
SYSTEMS, INC. ) NAL/Acct. No. 200732080025  
)  
Licensee of Various Site-by-Site Licenses in ) FRN No. 0003769049  
the Specialized Mobile Radio Service. )  
)  
PREFERRED ACQUISITIONS, INC. ) FRN No. 0003786183  
)  
Licensee of Various Economic Area Licenses )  
in the 800 MHz Specialized Mobile Radio )  
Service )

To: The Honorable Richard L. Sippel  
Chief Administrative Law Judge

**RECEIVED - FCC**

**JUL 29 2009**

Federal Communications Commission  
Bureau / Office

## REPLY TO OPPOSITION TO MOTION FOR LIMITED INTERVENTION

Michael D. Judy, on behalf of himself and the undersigned Movants (collectively "Movants"), hereby responds to the Enforcement Bureau's Opposition ("Opposition") to the Movants' Motion for Limited Intervention ("Motion") in the above-captioned matter. The Opposition contains a number of arguments against grant of the Motion with which the Movants strongly disagree. Nevertheless, the Movants here seek only to highlight one point on which the Enforcement Bureau and the Movants apparently do agree. That agreed-upon point argues strongly in favor of granting the Motion.

As the Motion makes clear, intervention in this case has been sought only for the purpose of asking the Presiding Judge to hold any proposed settlement between the Enforcement Bureau

and the above-captioned corporate parties in abeyance pending resolution of litigation recently initiated in the Delaware Chancery Court. That litigation challenges, among other things, Charles Austin's lawful entitlement to exercise any ongoing or future managerial authority over Preferred Communications Systems, Inc. ("PCSI"). Although the Enforcement Bureau seeks to disparage the value of the Movants participation for this limited purpose, the Bureau also acknowledges that "no party to the settlement negotiations, least of all the Bureau, is interested in expending time and effort in negotiating, executing and complying with a settlement that would ultimately fail due to Austin's lack of authority."<sup>1</sup>

However, if the parties propose a settlement that has been negotiated by Mr. Austin (acting as the sole officer of PCSI and, separately, in his individual capacity) and the Movants are denied the requested intervention, it is very likely that the Presiding Judge will be reviewing a settlement which Mr. Austin will not be able to implement and which may well be repudiated by a new governing Board installed as a result of the Chancery Court's orders.<sup>2</sup> There is no reason for the Presiding Judge to expend that effort when a civil court is currently considering material issues that impact any settlement that may be presented in this case, particularly where, as here, the matter is likely to be resolved in a reasonably short time.

In fact, the Chancery Court is currently holding September 28-30, 2009 open for a one day hearing on Mr. Judy's various motions. As a result, only a few months from now the Chancery Court will almost certainly order: (a) the prompt holding of a PCSI shareholders'

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<sup>1</sup> Opposition at 4.

<sup>2</sup> Any such settlement should already be suspect, as it is not clear that the interests of PCSI and Mr. Austin, who is a named party in his individual capacity, in any settlement of the charges addressed in the litigation would be identical. Given the potential that Mr. Austin's interests as an individual party may conflict with the interests of the Company in this proceeding, the Chancery Court, acting as a court of equity, also has the power to require the imposition of a receiver or trustee for PCSI to oversee any settlement discussions and/or litigation defense to assure that the company's interests distinct from Mr. Austin's personal interests are adequately protected.

meeting at which additional directors are elected;<sup>3</sup> and (b) the immediate seating of a director chosen by PCSI's preferred shareholders. At such a shareholders' meeting, there is a strong likelihood that Mr. Austin will either be removed as a director of PCSI and/or additional members will be elected to PCSI's board of directors. That newly-elected board will, in turn, have the power to remove Mr. Austin as the President and CEO of the Company.<sup>4</sup> The wisdom of allowing the limited intervention sought in the Motion is therefore clear.

Movants share the Enforcement Bureau's desire to move forward in this case. PCSI's inability to move forward with its planned wireless system as a result of the charges brought by the Commission in the pending litigation has significantly harmed the Movants' investment. Movants nevertheless believe that this harm can be reversed when PCSI's shareholders are given the opportunity to install qualified management to work through a fair and just settlement of this matter with the Enforcement Bureau and the Presiding Judge. This matter has been pending for several years, and negotiations for a settlement only started a few months ago. The short time that the case may be held further in abeyance while the Chancery Court rules on the rights of the shareholders of PCSI to manage appropriately the company's affairs will not add to the harm

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<sup>3</sup> Contrary to the Bureau's suggestion that the Movants are not likely to prevail in the Chancery Court (Opposition at 4), under applicable Delaware law 8. Del C. § 211(c), the Court of Chancery may summarily order a meeting of stockholders to be held upon the application of *any* stockholder if, among other things, there be a failure to hold the annual meeting for election of directors for a period of 13 months after the latest to occur of the organization of the corporation, its last annual meeting or the last action by written consent to elect directors in lieu of an annual meeting. In the case of PCSI, it has never held an annual meeting. Moreover, under Delaware law the annual election of directors must be in accordance with the terms of the corporation's charter. In the case of PCSI, its charter requires that so long as the holders of the Series A Preferred Stock have the right to elect a director, "the Board shall consist of no less than four (4) and no more than nine (9) members." Thus, even assuming that Mr. Austin's election was valid (which point Movants do not concede), his election alone would be an insufficient election of directors under the PCSI charter. The failure to hold any annual meeting is virtually indefensible under Delaware law and, as such, Mr. Judy is therefore almost certain to prevail.

<sup>4</sup> The Enforcement Bureau suggests that there is no reason to believe that any action will be taken as a result of the Chancery Court's decisions because the Movants have not adequately demonstrated that they control sufficient shares to make such changes. Opposition at 8. However, the Presiding Judge cannot ignore the fact that an overwhelming number of PCSI's shareholders have sought intervention in this case expressly to assure that Mr. Austin is not allowed to act against the best interests of the shareholders, rather than in his own interests alone. There can be little doubt, then, that when the Chancery Court orders a shareholders' meeting for the election of PCSI directors, a sufficient number will be voting to take the actions necessary to guide further activity by Mr. Austin in this case.

already done, but will, instead, assure that any settlement that is reached in this case will be sustainable. This should be the Enforcement Bureau's primary objective at this point, and the Presiding Judge's hope in reviewing a settlement if one is presented to him.<sup>5</sup> Allowing the Movants the limited intervention they seek here to allow them to ask for a delay in consideration of any settlement that might be reached before the Chancery Court has acted assures that all of these objectives will be achieved.

For the foregoing reasons, the Presiding Judge should grant the Motion for Limited Intervention.

Respectfully submitted,

*Michael D. Judy*  
Michael D. Judy

On behalf of himself and the following:

Linda Allen  
Kenneth E. Aull  
Alison D. Aull  
Carole Lynn Downs  
Kenneth Fry  
Lia R. Gutierrez  
James Herrick  
Jane Herrick  
Jamison N. Herrick  
Mary E. Herrick  
John Herrick  
Sharlene Herrick  
Julie Herrick  
Marilyn Huckins  
Lee Jones  
R. J. Leedy  
Alan D. Pelton

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<sup>5</sup> In denying another party the right to intervene, the Presiding Judge noted that "[i]nterests of PCSI shareholders are being represented by the corporate parties and by a corporate officer. Shareholder derivative complaints against corporate management are recognized in civil courts but not at the FCC." (Order, FCC 09M-48, at 2, ALJ, rel. July 16, 2009). All that the Movants request by their intervention is to allow the civil actions that are pending, and that are likely to be resolved in less than two months, to take their course. This will ensure that the corporate parties and corporate officers who are representing the interests of the shareholders are, indeed, those lawfully designated by the shareholder interests.

Kathryn A. Pelton  
Neil Alan Scott  
Michael A. Scott  
John G. Talcott III  
Dorothea J. Talcott  
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July 29, 2009

### CERTIFICATE OF SERVICE

I, Michael D. Judy, do hereby certify that on this 29th day of July, 2009, the foregoing Reply to Opposition to Motion for Limited Intervention was served by first class mail, postage prepaid, on the following persons:

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\* Also served by hand delivery.

*Michael D. Judy*  
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